Supreme Court, U.S.
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No. 01-543

In the Supreme Court of the United States

GLOBAL NAPS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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17 pp

QUESTION PRESENTED

Whether the Federal Communications Commission, acting on a complaint brought pursuant to Section 208 of the Communications Act of 1934, 47 U.S.C. 208 (1994 & Supp. V 1999), properly concluded that petitioner's tariff was unlawful under Section 201(b) of the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 247 F.3d 252. The opinions and orders of the Federal Communications Commission (Pet. App. 15a-35a and 36a-57a) are reported at 15 F.C.C.R. 5997 and 15 F.C.C.R. 12,946.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 2001. A petition for rehearing was denied on June 29, 2001 (Pet. App. 58a). The petition for a writ of certiorari was filed on September 27, 2001. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

On April 14, 1999, petitioner, a competitive local exchange carrier (LEC), filed a tariff that purported to impose a $0.008 per minute surcharge on the delivery of all Internet-bound calls for which it "does not receive compensation * * * under the terms of an interconnection agreement." Pet. App. 86a-87a. Verizon Communications filed a complaint with the FCC contesting petitioner's tariff. *Id.* at 5a. The FCC invalidated the tariff on the grounds that it was "unjust and unreasonable," in violation of 47 U.S.C. 201(b), and that it was inconsistent with two of the Commission's rules. Pet. App. 36a-57a. The Commission also denied petitioner's request for reconsideration. *Id.* at 15a-35a. Petitioner filed a petition for review of both orders, which the court of appeals denied. *Id.* at 1a-14a.

1. LECs are required to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5) (Supp. V 1999). Under such arrangements, the carrier that originates a call on behalf of the calling party is paid by its customer and then compensates the carrier that completed the call. The FCC had interpreted Section 251(b)(5) as applying only to "local calls"—those that "originate and terminate within a local [call] area," Pet. App. 2a (citing *In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996*, 11 F.C.C.R. 15,499, 16,013 para. 1034 (1996)), but carriers are permitted to include provisions in their interconnection agreements that go beyond the requirements mandated by law, 47 U.S.C. 252(e)(1) (Supp. V 1999). Parties to interconnection agreements are supposed to negotiate the rates and terms under which compensation will be paid, but they may submit the matter to

arbitration by the relevant state public utility commission if they are unable to agree. Pet. App. 2a (citing 47 U.S.C. 252(e)(1) (Supp. V 1999)).

Petitioner and Verizon are parties to interconnection agreements in several States. Pet. App. 4a. In 1997, they entered into an agreement in Massachusetts that provides that "'[r]eciprocal compensation only applies to the transport and termination of Local Traffic,' defined as 'a call which is originated and terminated within a given [Local Access and Transport Area or "LATA"]' in Massachusetts." *Ibid.* (quoting agreement). The parties could not agree whether this clause covered Internet-bound calls to Internet Service Providers (ISPs), but agreed to be bound by any interpretations of that clause or of identical language in other agreements to which Verizon was a party that were rendered by the Massachusetts Department of Telecommunications and Energy (Massachusetts DTE). *Ibid.*

On October 21, 1998, the Massachusetts DTE ruled that Verizon was required to pay reciprocal compensation for the delivery of Internet-bound traffic to MCI WorldCom, and directed Verizon to pay reciprocal compensation to other LECs (including petitioner) with which it had identical agreements. Pet. App. 4a (citing *Complaint of MCI WorldCom, Inc.*, D.T.E. 97-116 (Mass. D.T.E. Oct. 21, 1998)). In February 1999, however, the FCC issued an order holding that Internet-bound calls "are not local" (and thus not covered by the requirements of 47 U.S.C. 251(b)(5) (Supp. V 1999)) because "[w]hile the call to the ISP may be local, * * * the terminating end of the call is actually the site reached by the Internet connection." Pet. App. 3a (citing *In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, Inter-carrier*

Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689, 3704 para. 24 (1999)).[1] On May 19, 1999, the Massachusetts DTE vacated its prior order and held that Verizon was not required to pay reciprocal compensation for Internet-bound traffic. *Id.* at 4a-5a (citing *Complaint of MCI WorldCom, Inc.*, D.T.E. 97-116-C (Mass. D.T.E. May 19, 1999) (5/19/99 DTE Order)).[2] The Massachusetts DTE did, however, order Verizon to pay an amount equal to the interconnection agreement's reciprocal compensation rate applied to the traffic not in excess of a 2:1 terminating-to-originating ratio, see *id.* at 25a (citing 5/19/99 DTE Order 28; *Complaint of MCI WorldCom, Inc*, D.T.E. 97-116-D, at 16 n.11 (Mass. D.T.E. Feb. 25, 2000) (2/25/00 DTE Order)), and ruled "that the parties could engage in further negotiations, mediation, and arbitration under section 252 of the Act to attempt to amend their existing interconnection agreement to provide for such

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[1] The D.C. Circuit vacated and remanded this order, holding that the FCC had not provided an adequate explanation of why Internet-bound calls could not be treated as local calls. See *Bell Atl. Tel. Cos.* v. *FCC*, 206 F.3d 1 (D.C. Cir. 2000). On April 27, 2001, the Commission issued an order reaffirming its conclusion that ISP-bound traffic is not subject to the reciprocal compensation requirement of Section 251(b)(5), albeit based on a different rationale. The Commission explained that a different statutory provision, 47 U.S.C. 251(g) (Supp. V 1999), demonstrated Congress's intent to exclude ISP-bound traffic from the requirements of Section 251(b)(5). *In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, No. 96-98, para. 34 (FCC Apr. 27, 2001), 2001 WL 455869.

[2] The Massachusetts DTE reaffirmed this ruling after the D.C. Circuit vacated the FCC's order. See Pet. App. 5a (citing *Complaint of MCI WorldCom, Inc.*, D.T.E. 97-116-D (Mass. D.T.E. Feb. 25, 2000)).

compensation * * * for the period beginning when [Verizon] first stopped paying." *Id.* at 34a (citing 2/25/00 DTE Order 19-20).

2. On April 14, 1999, before the Massachusetts DTE vacated its original decision, petitioner filed the tariff at issue here with the FCC. Pursuant to the Commission's rules, the tariff was filed on one day's notice and took effect the next day. See 47 C.F.R. 61.23(c). The tariff provided for a surcharge of $0.008 per minute on "all ISP-bound traffic for which [petitioner] does not receive compensation * * * under the terms of an interconnection agreement." Pet. App. 86a-87a. The tariff further declared that "[f]ailure * * * to actually compensate [petitioner] for ISP-bound traffic as local traffic under the terms of an Interconnection Agreement shall constitute an election to compensate [petitioner] under the terms of this Tariff." *Id.* at 87a. On May 27, 1999, petitioner billed Verizon for approximately $1.7 million pursuant to this tariff. *Id.* at 5a. Verizon refused to pay, and, on July 8, 1999, it filed a complaint with the FCC pursuant to 47 U.S.C. 208 (1994 & Supp. V 1999). Pet. App. 5a.[3]

3. The Communications Act of 1934 requires that all "charges, practices, classifications, and regulations" related to interstate communications services must be "just and reasonable." 47 U.S.C. 201(b). The FCC has been empowered to promulgate rules "as may be necessary in the public interest to carry out the provisions of this [Act]," *ibid.*, and to regulate the form and content of tariffs that LECs impose on each other, see 47 U.S.C. 203. The Commission is also authorized "to investigate

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[3] Section 208(a) permits "[a]ny person * * * complaining of anything done or omitted to be done by any common carrier subject to this [Act]" to file a complaint with the Commission.

* * * matters complained of in such manner and by such means as it shall deem proper," 47 U.S.C. 208(a), and to "issue * * * order[s] concluding such investigation[s]." 47 U.S.C. 208(b)(1) (Supp. V 1999); 47 U.S.C. 208(b)(2). Such orders are "final order[s]" that may be appealed to the D.C. Circuit pursuant to 47 U.S.C. 402(a). See 47 U.S.C. 208(b)(3).

On December 2, 1999, the Commission granted Verizon's complaint and held that petitioner's tariff was unlawful. Pet. App. 36a-57a. The Commission concluded that "the challenged provisions of [petitioner's] tariff * * * are unjust and unreasonable under Section 201(b) of the Act" because they "condition the imposition of charges on circumstances that were indeterminate when the tariff took effect and remain indeterminate today." *Id.* at 37a (footnote omitted). The Commission observed that the parties had agreed to submit to the Massachusetts DTE the question of whether the reciprocal compensation provisions of their interconnection agreement applied to ISP-bound traffic, *id.* at 39a-40a, and noted that DTE had not reached a final determination regarding that question when petitioner filed its tariff, *id.* at 51a. Consequently, explained the Commission, the parties did not know at the time the tariff was filed whether petitioner would receive compensation for such traffic pursuant to the terms of the interconnection agreement, and thus could not determine whether payment was mandated under the tariff. *Id.* at 37a, 51a-55a. The Commission thus concluded that the tariff violated "section 201(b) of the Act, as reflected in section 61.2 of our rules." *Id.* at 55a; see 47 C.F.R. 61.2(a) ("[A]ll tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.").

The Commission also concluded that the tariff was unlawful for another reason. The Commission's rules provide that, in the absence of a valid waiver, "no tariff publication filed with the Commission may make reference to * * * any other document or instrument." 47 C.F.R. 61.74(a). The Commission held that petitioner's tariff violated this mandate because it "is not self-contained, but instead cross references, impermissibly, 'an interconnection agreement.'" Pet. App. 56a.

4. Petitioner sought reconsideration, which the Commission denied. Pet. App. 15a-35a. As pertinent here, petitioner argued that it was "unjust and unreasonable * * * to retroactively relieve [Verizon] of any obligation to pay anything at all for the work [petitioner] does in delivering jurisdictionally interstate ISP-bound traffic at [Verizon's] request." *Id.* at 24a (quoting petitioner's brief). The Commission responded that petitioner "could have reached a mutually acceptable resolution with [Verizon] regarding intercarrier compensation for ISP-bound traffic *before* executing an interconnection agreement with, and accepting traffic from, [Verizon]." *Id.* at 24a-25a. "Having freely chosen to (1) forego the certainty of compensation through a jointly acknowledged agreement * * *, and (2) litigate the compensation issue with the Massachusetts DTE," petitioner, reasoned the Commission, "cannot be heard now to complain that it is somehow 'unfair' to disallow compensation under the entirely separate, and mutually exclusive, tariff process." *Ibid.* The Commission also stressed that petitioner "has * * * obtained the right to receive compensation" because the Massachusetts DTE had ordered Verizon to "pay an amount equal to the contract's reciprocal compensation rate applied to the traffic not in excess of

a 2:1 terminating-to-originating ratio" and had "afforded [petitioner] the opportunity to try to obtain more compensation [t]han that * * * pursuant to additional negotiation/mediation/arbitration under section 252 of the Act." *Id.* at 25a-26a (footnote omitted).

5. Petitioner filed a petition for review, which the D.C. Circuit denied. Pet. App. 1a-14a. The court of appeals specifically upheld the Commission's determination that the tariff was invalid as filed because it conflicted with two of the Commission's rules. *Id.* at 10a-11a. The court also rejected petitioner's assertion that the FCC "does not have the authority to invalidate tariffs under Section 208." *Id.* at 11a. Finally, the court described as "clearly wrong" petitioner's argument that relief granted in a formal complaint proceeding under Section 208 cannot be retroactive in effect. *Id.* at 13a. It noted that "insofar as Section 208 authorizes the award of damages or other remedies, it is always 'retroactive' in its application in that it will always be changing the economic consequences of a carrier's prior conduct." *Ibid.* Where, as "was the case here," a tariff is "so plainly defective as to be a legal nullity," the court of appeals determined that the tariff may be declared void as of its date of filing "to ensure that an injustice is not worked on the affected customers." *Ibid.* (internal quotation marks and citation omitted). The court specifically held that such a result was consistent with this Court's decision in *Interstate Commerce Commission* v. *American Trucking Associations*, 467 U.S. 354 (1984), because the FCC voided the tariff "in furtherance of a 'specific statutory mandate' to which the action was 'directly and closely tied.'" Pet. App. 13a (quoting *American Trucking*, 467 U.S. at 367). The court noted that its holding did not leave petitioner

"without opportunity to seek redress," because petitioner could still "seek compensation under the interconnection agreement before the [Massachusetts] DTE as well as to seek a negotiated compensation settlement with Verizon." *Id.* at 14a.[4]

ARGUMENT

Petitioner no longer disputes the FCC's conclusion that its tariff was unlawful because it violated two of the Commission's rules. Nor does petitioner contend that the decision below conflicts with that of any other court of appeals. Instead, petitioner argues (Pet. 9-15) that this Court should grant certiorari because the unanimous decision of the court of appeals conflicts with this Court's decision in *American Trucking*. No such conflict exists.

1. The issue in *American Trucking* was whether the Interstate Commerce Commission (ICC) had the "authority to reject effective tariffs that have been submitted in substantial violation of rate-bureau agreements." 467 U.S. at 355. The Court first concluded that Congress had not expressly given the ICC the power to take such action, see *id.* at 361-364, rejecting the claim that such authority was conferred by a provision that authorized the ICC to "reject a tariff * * * if that tariff violates this section or regulation of the Commission carrying out this section," *id.* at 361 (quoting 49 U.S.C. 10762(e)). The Court stated that "the term 'reject' connotes a refusal to receive at the threshold," *id.* at 362, and reasoned that concluding that Section

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[4] The court of appeals also rejected petitioner's contention that the Commission violated its own rules and petitioner's due process rights by basing its decision on arguments not made by either party. Pet. App. 7a-9a. Petitioner does not renew that argument here.

10762(e) permitted the ICC to reject effective tariffs would disrupt the statutory scheme because it would undermine "the procedural safeguards * * * that Congress built into remedies clearly designed to reach effective tariffs," *ibid.*

The Court nevertheless concluded that the ICC's actions had been lawful. See 467 U.S. at 363-370. The Court stated that "the Commission may elaborate upon its express statutory remedies when necessary to achieve specific statutory goals," *id.* at 365, and held that "[t]o lie within the Commission's discretionary power, the proposed remedy must satisfy two criteria: first, the power must further a specific statutory mandate of the Commission, and second, the exercise of power must be directly and closely tied to that mandate," *id.* at 367. The Court determined that the first requirement was satisfied because Section 10706(b)(3) of the Motor Carrier Act of 1980, 49 U.S.C. 10706(b)(3), "prescribes the guidelines for rate-bureau agreements" and because "the procedures governing the administration of [that Section] demonstrate that Congress envisioned that the Commission * * * would be the primary enforcer of the guidelines." 467 U.S. at 368. The Court held that the ICC's action was "directly and closely tied" to its statutory mandate because it was "directly aimed at ensuring that motor carriers comply with the guidelines established by Congress" and because it was "within the Commission's discretion to decide that the only feasible way to fulfill its mandate is to condition approval of motor-carrier tariffs on compliance with approved rate-bureau agreements." *Id.* at 367, 370.

2. In *American Trucking*, this Court was clear that the "specific statutory mandate" and "directly and closely" criteria utilized in that case apply *only* when

Congress has not expressly authorized an agency to declare that previously filed tariffs are unlawful. See 467 U.S. at 367. Although petitioner disputes its conclusion (Pet. 4, 12-13), the D.C. Circuit here held that 47 U.S.C. 208 (1994 & Supp. V 1999) does grant the FCC the "authority, upon complaint by an injured party, to adjudicate the lawfulness of a carrier's past and present rates and practices." Pet. App. 12a (quoting *Hi-Tech Furnace Sys., Inc* v. *FCC*, 224 F.3d 781, 786 (D.C. Cir. 2000)). Accordingly, the court of appeals had no need to apply the *American Trucking* criteria here. To even reach the question on which petitioner seeks review, therefore, this Court would first need to resolve the antecedent question of whether the court of appeals erred in concluding that the Commission had express authority to do what it did here—a question on which the petition does not seek review. That in itself is a sufficient reason to deny certiorari.

3. Even if *American Trucking* were applicable here, petitioner errs in asserting that the D.C. Circuit's holding is inconsistent with it. Section 201(b) of the Communications Act requires that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate] communication service * * * be just and reasonable," 47 U.S.C. 201(b), and the same Section confers upon the FCC authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act]," *ibid.* Furthermore, Section 203 of the Act grants the FCC the authority to regulate the form and content of tariffs. 47 U.S.C. 203. Pursuant to these grants of authority, the Commission has issued rules requiring that tariffs "contain clear and explicit explanatory statements regarding the rates and regulations,"

47 C.F.R. 61.2(a), and prohibiting tariffs from "mak[ing] reference to * * * any other document or instrument," 47 C.F.R. 61.74(a).

The FCC's action here was taken pursuant to its "specific statutory mandate" to enforce Section 201(b) and Section 203, and it was "directly and closely tied to that mandate" because it was necessary to prevent the applicability of a clearly illegal tariff. Pursuant to 47 C.F.R. 61.23(c), petitioner's tariff was filed on one-day's notice and took effect the next day. As the court of appeals aptly noted: "Merely because a tariff is presumed lawful upon filing does not mean that it is lawful. Such tariffs still must comply with the applicable statutory and regulatory requirements." Pet. App. 13a. The Commission's actions here were necessary to prevent petitioner from reaping a benefit from a tariff that even petitioner now concedes was illegal when filed.[5] Further review is not warranted.

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[5] Two of the factors that lessened the Court's concerns about possible harshness of retroactive invalidation in *American Trucking* are present here. Petitioner's tariff was clearly unlawful under FCC regulations, and it is at least "unclear" whether it was even permissible for petitioner to file a tariff dealing with ISP-bound traffic at all because "[t]he FCC has not authorized, let alone required, carriers to file tariffs for local Internet-bound traffic." Pet. App. 13a; cf. *American Trucking*, 467 U.S. at 370-371. In addition, the Commission took action only after formal proceedings, and petitioner was afforded a right to judicial review. Cf. *id.* at 371.

Any potential unfairness is further diminished by two additional factors. First, as both the Commission and the court of appeals observed, petitioner has available to it mechanisms for obtaining compensation for its handling of ISP-bound traffic notwithstanding the invalidation of its tariff. See pp. 7-9, *supra*. Moreover, the situation presented is entirely of petitioner's own making. Petitioner could have negotiated an agreement with Verizon that

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2001

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clearly required compensation for local ISP-bound traffic. Pet. App. 24a-25a. Instead, it entered into an agreement that it knew that Verizon understood as not applying to such traffic and agreed to have the Massachusetts DTE resolve the controversy. *Id.* at 25a; see also *id.* at 14a ("That [petitioner] sought to game the existing rules, and lost, does not mean the FCC was arbitrary and capricious in its application of its own rules.").